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ABSTRACT

In these remarks, the Assistant Attorney General for the Department of Justice, Civil Rights Division, discusses the Department's policy to enforce Federal equal employment opportunity guarantees without supporting quotas and other numerical formulae that provide preferential treatment. The discussion counters the charge that this policy is inconsistent with the law as enunciated by the Supreme Court and as demonstrated in three cases often cited: 1) "Bakke," a reverse discrimination case in which the court supported a school's interest in a diverse student body but upheld a student's individual right to be free from racial discrimination; 2) "Fullilove," where minority set aside provisions in public works employment were supported; and 3) "Weber," in which a race conscious quota scheme for employee training was upheld. It is contended that these legal precedents do not represent Supreme Court endorsements of quotas, but merely demonstrate that the limited use of racial criteria is not forbidden. It is emphasized that the Department's approach to race and sex discrimination in employment provides relief for identifiable victims of discrimination but removes considerations of color and gender in future hiring and promotion practices. (Author/MJL)

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REMARKS

OF

WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

THIRTY-FIFTH NATIONAL CONFERENCE ON LABOR

11:00 A.M.
FRIDAY, JUNE 11, 1982
NEW YORK UNIVERSITY
NEW YORK, NEW YORK

CG 022 287

It is a special pleasure for me to appear before this distinguished gathering this morning to discuss "Justice Department Policies on Equal Employment and Affirmative Action." The topic "Affirmative Action" is one that unavoidably sparks intense debate, and I welcome the opportunity to share with you the position we at the Department of Justice have taken in that debate and our reasons for doing so.

There is -- and indeed can be -- but a single starting point, and that is with the fundamental precept on which this country's policies in the area of employment discrimination, as in all other civil rights areas, must rest. I speak, of course, of the principle that discrimination based on race, gender or creed is wholly unacceptable. As the Attorney General recently declared:

> "Freedom from discrimination consists of the right to participate fully in American society on the basis of individual merit and desire. That right engenders a guaranty that no one's path should be blocked because of racial or ethnic characteristics."

I would hope by now that for most people in our society, this truth is self-evident. No elaborate case need be made to sustain its validity, no marshalling of evidence or articulation

of elaborate reasons. Simply to state the proposition is enough: discrimination based on these immutable characteristics is wrong -- legally, ethically and morally wrong. From this flows -- inexorably, in our view -- the enforcement policy we at the Justice Department are pursuing in suits brought under Title VII and similar statutes. I would describe that policy in the following terms: the Department of Justice will not retreat one step from its historic commitment to enforce federal equal employment opportunity guaranties; but, in relentlessly pursuing that enforcement responsibility, we will no longer rely upon, or in any respect support, remedies that use quotas, or other numerical or statistical formulae designed to provide to nonvictims of discrimination preferential treatment based on race, gender, national origin, or religion.

Whatever else may be said about this policy, there realistically can be no claim of surprise. The President's opposition to discrimination and his devotion to the American ideals of color blindness and gender neutrality have long been a matter of public record, and as he has frequently pointed out, were views firmly held "long before it ever became a . . . national issue under the title of civil rights." Indeed, a fundamental tenet of the President's campaign was that "no individual should be victimized by unfair discrimination because of race, sex, . . . national

origin or religion," and that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory."

The Department's policy grounded on these principles has, of course, drawn sharp criticism. That is to be expected. Our position on appropriate remedial action in the employment arena unquestionably marks a change from our predecessors' infatuation with statistical solutions. And, whenever there is change -- of any kind -- critics are quick to surface. This is offered simply as an observation, not as any form of condemnation. For the constitutionally guaranteed right of every American -- irrespective of race, religion, sex, economic status, or any other personal characteristic -- to participate in public discourse on important Government policies distinguishes this Nation from most other countries in the world. Thus, responsible debate -- provided it is indeed responsible -- is always to be encouraged, and we welcome the expression of different views.

In joining that debate with you today, the criticism on which I want to focus concerns the charge that our enforcement policy in the area of equal employment opportunity is inconsistent with the law as enunciated by the Supreme Court. This assertion is usually accompanied by reference to the

affirmative action trilogy -- Bakke, Fullilove, and, of course, Weber. A brief review of those three cases demonstrates that our enforcement policy is in no way inconsistent with the Supreme Court's pronouncements in this area.

Bakke involved a challenge to a special admissions program voluntarily adopted by a State medical school, under which 16 of 100 places in the entering class were reserved for members of certain racial and ethnic minority groups. The plaintiff, a white male who was twice denied admission under the school's general admissions program, claimed that the special admissions program operated to exclude him from the school on the basis of race, a violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

The outcome of the constitutional issue was governed by the views of Justice Powell, who tested the school's racially discriminatory admissions program against the "strict scrutiny" constitutional standard traditionally applied to racial classifications. Justice Powell found one of the state interests offered by the school in support of the special admissions program -- attainment of a diverse student body -- to inhere in the First Amendment's protection of academic freedom and thus to be sufficiently compelling to warrant consideration of whether the special admissions program was "necessary" to the accomplishment of the school's objective.

Justice Powell concluded, however, that although the school's First Amendment interest in a diverse student body might warrant some consideration of race in the admissions process -- such as deeming race or ethnic background a "plus" in a particular applicant's file -- it did not justify the reservation of a specific number of places for minorities. In so holding, Justice Powell underscored that the Constitution protects individuals, not groups. "The fatal flaw in [the school's] preferential program," he observed, was "its disregard of individual rights as guaranteed by the Fourteenth Amendment." Accordingly, the school's racially discriminatory admissions program was invalidated, and Mr. Bakke's individual constitutional right to be free from racial discrimination was upheld. Just last month, Mr. Bakke graduated from medical school.

In the field of public employment -- and I should point out here that the Justice Department's enforcement role in the area of equal employment opportunity is limited to public employers, which are, of course, restricted in their decision-making ability by the dictates of the Fourteenth Amendment -- in the field of public employment, the constitutional implications of the Bakke case are unclear, but let me suggest a couple of conclusions that can reasonably be advanced. First, the compelling state interest principally at issue in

Bakke -- that is, the school's First Amendment interest in a diverse student body -- would be wholly inapplicable in the context of public employment, save arguably for the teaching profession. Thus, even the limited use of racial criteria condoned by Justice Powell in Bakke would presumably be impermissible in an analogous case involving a typical public employer. Second, although Justice Powell recognized the state's legitimate interest in remedying past discrimination as sufficiently compelling to justify race-conscious remedial action in some circumstances, he stressed that such remedial action is impermissible in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. The state's alleged interest in remedying "societal discrimination," which Justice Powell termed "an amorphous concept of injury that may be ageless in its reach into the past," was rejected.

That race-conscious preferential treatment must be predicated on a finding of past unlawful discrimination was reiterated in Fullilove, which rejected a constitutional challenge to a federal law requiring that at least ten percent of federal funds for local public works projects be set-aside for contracts with "minority business enterprises." In announcing the judgment of the Court, the Chief Justice, joined by Justices White and Powell, repeatedly stressed that the set-aside provision was a "strictly remedial measure,"

designed to discourage procurement practices that might perpetuate the effects of prior discrimination against minority businesses with respect to public contracting opportunities. In a concurring opinion, Justice Powell emphasized that a proper finding of past unlawful discrimination is critical to the constitutional validity of any form of racial preference, stating: "Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred."

In contrast to the medical school involved in Bakke, Congress was clearly qualified to make such a finding of past discrimination. Indeed, noting that no organ of Government holds more comprehensive remedial power than Congress, the lead opinion emphasized that the minority set-aside provision at issue in Fullilove called into question "not . . . the limited remedial powers of a federal court, but . . . the broad remedial powers of Congress." These statements -- when read against the backdrop of strenuous dissents by three Justices in Fullilove who viewed the minority set-aside as an unconstitutional exercise of Congress' broad remedial authority -- raise a serious question whether

a majority of the Supreme Court would countenance the remedial use of racially preferential treatment of nonvictims of past discrimination by any governmental body other than Congress (including the federal courts), even after a finding of past discrimination has been made. At the very least, Fullilove hardly stands as strong authority that it would.

The final case in the affirmative action trilogy, Weber, arose in the context of private employment and thus raised no constitutional claims. That case involved a collective-bargaining agreement between Kaiser Aluminum and the United Steelworkers which created an on-the-job craft training program requiring that no less than one minority applicant be admitted for every nonminority applicant until the percentage of blacks in craft positions equalled the percentage of blacks in the local work force. Eligibility for the craft training program was to be determined on the basis of plant seniority, with black and white applicants to be selected on the basis of their relative seniority within their racial group. The record contained no evidence that either Kaiser or the union had practiced racial discrimination in the past.

Brian Weber, whose application to the training program was twice passed over in favor of less senior minority applicants, contended that the selection quota violated Title VII of the

1964 Civil Rights Act, which makes it unlawful for an employer or labor organization "to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training." Expressly recognizing that a "literal construction" of the words of Title VII supported Weber's claim, a majority of the Court called upon the "spirit" of Title VII in concluding that the statute did not prohibit the challenged quota scheme.

Emphasizing "the narrowness of [the] inquiry" before the Court, the majority made clear that its approval of race-conscious affirmative action plans was limited to "plans that accord racial preferences in the manner and for the purposes provided in the Kaiser-[Steelworkers] plan." In this regard, the majority stressed that the challenged plan was voluntary, that it arose in the context of private employment and thus raised no constitutional questions, and that it was a temporary measure, intended not to maintain racial balance, but simply to eliminate a manifest racial imbalance in a traditionally segregated job category.

Whether one agrees or disagrees with the Weber decision, few would quarrel with the proposition that it has little impact on the Justice Department's enforcement of federal protections against employment discrimination in the public sector. One thing that seems clear is that the

racial preference permitted under Title VII in Weber would have been constitutionally prohibited under Bakke and Fullilove had Kaiser been a public employer. Neither of the legitimate state interests recognized by the controlling opinions in Bakke and Fullilove would have been available to Kaiser under the facts of the Weber case. Because Kaiser's activities were not entitled to the First Amendment's protection of academic freedom, it would not be able to claim a constitutional interest in a racially diverse work force in support of its preferential selection scheme. Indeed, even if Kaiser had been engaged in academic pursuits, the First Amendment interest in academic freedom would not be sufficiently compelling, according to Justice Powell's opinion in Bakke, to justify a one-for-one selection quota. Moreover, the governing opinions in both Bakke and Fullilove hold that a finding of past unlawful discrimination is critical to the constitutional validity of any form of racial preference. There was no such finding -- nor even an evidentiary basis for one -- in Weber.

Where, then, does a responsible reading of these three Supreme Court precedents leave us? Perhaps the most important point to be made about the affirmative action trilogy, at least insofar as the Justice Department's policy on equal employment opportunity is concerned, is that none of these pivotal cases required the remedial use of racial

preferences, set asides, or quotas; they merely hold that under the circumstances presented in those cases, limited use of racial criteria is not forbidden.

Moreover, the governing opinions in each of the cases contain strong implications that anyone using racial criteria under dissimilar circumstances does so at his own risk. Indeed, in stressing the temporary nature of Kaiser's voluntary program of preferential selection, the Weber court implicitly recognized that even in the context of purely private employment, Title VII would interdict Kaiser's program and forbid all future race-conscious preferential treatment once the racial composition of Kaiser's skilled craft workers approximated that of the local labor force. Indeed, that Title VII would not permit preferential selection of minority applicants for the purpose of maintaining a racial balance among Kaiser's skilled craft workers is made clear by the statute's legislative history. During the Senate debate on Title VII, Senators Clark and Case -- the bipartisan team "captains" of Title VII in the Senate -- took pains to refute the charge that Title VII would require maintenance of racially balanced work forces, remarking:

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to

> refuse to hire on a basis of race. It must be emphasized that discrimination is prohibited as to any individual.

The affirmative action trilogy thus hardly represents a ringing endorsement by the Supreme Court of quotas, or other similar statistical remedies, in public employment cases. To the contrary, Bakke, Fullilove and Weber, when carefully read, send a fairly clear signal that the principle of nondiscrimination remains a constitutional imperative from which the Court can be expected to permit departures only as absolutely necessary to make whole identified victims of established discriminatory conduct.

That is precisely the direction that the Department of Justice has taken in formulating a remedial approach to redress race and sex discrimination in the public workforce. Thus, our response to a finding of liability consists of the following three elements: (1) specific "make whole" relief for identifiable victims of discrimination, (2) injunctive relief requiring color-blind and gender-neutral future hiring and promotion practices, and (3) to further enhance equal employment opportunities, increased recruitment efforts reaching all segments of the relevant labor force, not just selected areas of a particular community.

The difference from past practice is obvious. Considerations of color and gender are removed from employment decisions. Discrimination will not be used to cure discrimina-

tion. Two civil wrongs do not make a civil right, and we will not compromise the integrity of our commitment to equal employment opportunity by pretending that they do. No matter how well intended or benign the motivation, each instance of race or sex discrimination, regardless of the victim's color or gender, stalls rather than advances our Nation's progress toward a truly nondiscriminatory society. Justice Robert Jackson made the point most graphically when he cautioned that, once the concept of racial discrimination is validated, it "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

This Administration is firmly committed to the view that the Constitution and laws of the United States protect the rights of every person -- whether black or white, male or female -- to pursue his or her goals in an environment of racial and sexual neutrality. We in the Justice Department are determined that the law not be used to divide society by treating persons differently according to their race or sex. In our view, adherence to the color-blind and gender-neutral principle of equal opportunity for all Americans will hasten the day when issues of racial and sexual injustice are matters of concern only to historians.